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Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-950

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WINCHESTER AND WESTERN RAILROAD COMPANY,
Appellant

v.

COMMONWEALTH OF VIRGINIA AND VIRGINIA STATE CORPORATION COMMISSION, DIVISION OF PUBLIC SERVICE TAXATION,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

MOTION TO DISMISS

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Pursuant to Rule 16.1, Appellees Commonwealth of Virginia and Virginia State Corporation Commission* (Commission)

---

*The Commission has established as an administrative unit its Division of Public Service Taxation to collect reports and to prepare recommendations on tax assessments of public service companies operating within the Commonwealth. The assessments for various types of taxes are made by order of the Commission, and the sums due are payable to the state and local treasurers.

move the Court to dismiss this appeal on the ground that the appeal is not within the Court's jurisdiction. In the alternative, the Commission moves the Court to dismiss this appeal on the ground that the judgment rests on an adequate non-federal basis.

STATEMENT OF THE CASE

Appellant Winchester and Western Railroad Company (Railroad or Company), a railroad incorporated and operating in Virginia, appeals from a decision of the Virginia Supreme Court affirming the Commission's assessment of the Company for rolling stock tax. The pertinent provisions of the Code of Virginia (1950), as amended, then in effect follow:

> §58-515. State tax on rolling stock.- The State tax on the rolling stock of railway companies doing business in this State shall be at the rate of

> one dollar on each one hundred dollars of the assessed full value thereof . . ..
>
> §56-524. Annual property report required. - Every railway company doing business in this State shall report on or before the fifteenth day of April, to the State Corporation Commission, its real and tangible personal property of every description as of the thirty-first day of December preceding, the fair cash value thereof, and the county, city, town or magisterial district in which it is located . . ..
>
> The report shall classify such property under the following heads . . . (5) Rolling stock, which shall include all locomotives, of whatever motive power, autocars, cars of every kind and description, and all other equipment which it is reasonably proper to class as rolling stock; provided that they shall report and be assessed on the average amount of rolling stock habitually used by them in this State . . ..

1972 Va. Acts 1448-51.

In April, 1981, the Railroad reported the value of its property as of December 31,

1980, and the Commission entered orders of assessment for various taxes, including the rolling stock tax imposed by Code §58-515, quoted above. As permitted by Virginia law, the Railroad applied for correction of the Commission's valuation of rolling stock and assessment of tax on that property. The Commission denied the application for correction of valuation, except for a minor adjustment to reflect a loss to fire, and the Company appealed to the Virginia Supreme Court for review.

The Virginia Supreme Court affirmed the Commission's decision on valuation of the Railroad's rolling stock in virtually all respects. The case was remanded for further proceedings on one narrow point of Virginia law. The Virginia Supreme Court found reasonable the

Commission's long-standing presumption that an intrastate railroad like the Company has only enough cars to render its public service in Virginia and that it is habitually using all of its own cars for that purpose. That presumption, however, was declared by the appellate court to be rebuttable, and the case was remanded solely to afford the Company an opportunity to rebut the presumption of habitual use of all of its cars in Virginia. Winchester & Western Railroad v. Commonwealth, 226 Va. 352, 359-60, 309 S.E.2d 590, 595 (1983) (hereinafter cited as Winchester & Western I). (App. at I-20 to -23.) The Railroad did not seek rehearing by the Virginia Supreme Court or seek review on appeal by this Court.

On remand, the Commission considered the evidence and arguments offered by the Railroad to show that the rolling stock it habitually used in Virginia, including cars of other railroads, was less than the 323 cars comprising its entire fleet on December 31, 1980, the assessment date. The Commission found that the evidence did not rebut the presumption of use and upheld its original valuation. The Company again appealed and the Virginia Supreme Court affirmed the Commission's decision on remand. Winchester & Western Railroad v. Commonwealth, No. 860055 (Va. Sup. Ct. Sept. 5, 1986) (mem.) (hereinafter cited as Winchester & Western II).

The Railroad now seeks review of Winchester & Western II by appeal to this Court. The Commission understands

the Railroad to invoke the Court's jurisdiction on the grounds that §58-524 of the Code of Virginia as applied in this case is repugnant to the Commerce Clause and Due Process Clause of the United States Constitution.

The Commerce Clause provides, in pertinent part: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . .." U.S. Const. art. I, §8, cl. 3. The Due Process Clause governing the states provides that, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . .." Id. amend. XIV, §1.

ARGUMENT

The Commission respectfully moves the Court to dismiss the Railroad's

appeal for its failure to invoke the Court's jurisdiction. The Commission believes that the opinion of the Virginia Supreme Court in Winchester & Western II raises no issue of federal law. In the alternative, any judgment rests on adequate non-federal grounds.

THE CASE ON APPEAL INVOLVES ONLY VIRGINIA LAW

In Winchester & Western I the Virginia Supreme Court saw the sole issue to be the interpretation of the phrase "habitually used . . . in this State" found in §56-524(5) of the Code of Virginia. 226 Va. at 356, 358, 309 S.E.2d at 593-94. (App. at I-7 to -8, -15 to -16.) All cars habitually used in Virginia are subject to the rolling stock tax. In reviewing the evolution and application of that section, the Virginia

Supreme Court found reasonable, but rebuttable, the Commission's presumption that an intrastate railroad had only enough cars to render its public service within Virginia and that such a railroad habitually used all of its cars for that purpose. The Virginia Supreme Court also found that the Commission could reasonably presume that, to the extent that an intrastate railroad did not use its own cars, it employed other railroads' cars which were, in effect, substitutes. Id. at 359, 309 S.E.2d at 595. (App. at I-20.)

According to the opinion, the Commission acknowledged that an intrastate railroad could rebut the presumption of habitual use in Virginia by showing that it had established a tax base for some of its cars in another jurisdiction. The

Virginia Supreme Court further concluded that the taxpayer could also rebut the presumption that all of its rolling stock is taxable by showing that the average amount of cars habitually used in Virginia, including cars owned by others, was less than the total amount of its cars. Id. at 359-360, 309 S.E.2d at 595. (App. at I-20 to -21.) The Virginia Supreme Court went on to find that the first avenue for rebutting the presumption was not open to the Railroad because none of the cars were subject to taxation outside Virginia. Id. at 360, 309 S.E.2d at 595. (App. at I-21.)

ANY FEDERAL QUESTION WAS REACHED IN WINCHESTER & WESTERN I

In considering the Railroad's appeal of the valuation of cars for rolling stock tax in Winchester & Western I, the

Virginia Supreme Court followed this Court's analysis in Central Railroad v. Pennsylvania, 370 U.S. 607, reh'g denied, 371 U.S. 856 (1962). There, the Court addressed the constitutional issues arising out of Pennsylvania's taxation of rolling stock owned by an intrastate railroad. The following portion of the Court's opinion is relevant to the case now on appeal:

> [T]angible property for which no tax situs has been established elsewhere may be taxed to its full value by the owner's domicile. If such property has had insufficient contact with States other than the owner's domicile to render any one of these jurisdictions a "tax situs," it is surely appropriate to presume that the domicile is the only State affording the "opportunities, benefits, or protection" which due process demands as prerequisite for taxation.
>
> Accordingly, the burden is on the taxpayer who contends that some portion of its total assets are beyond the reach of the taxing power of its domicile

> to prove that the same property may be similarly taxed in other jurisdictions.

370 U.S. at 612-13 (emphasis in original; citations omitted).

To the extent that a federal question was reached by the Virginia Supreme Court in the dispute over the valuation of the Company's rolling stock on December 31, 1980, it was reached and decided in Winchester & Western I. See Central Railroad, 370 U.S. at 612-13; Northwest Airlines v. Minnesota, 322 U.S. 292, 298-300, reh'g denied, 323 U.S. 809 (1944). If the Railroad believed that the Virginia Supreme Court was in error in finding that the Railroad did not establish a tax situs for cars in other jurisdictions, it was that decision in Winchester & Western I which should have been appealed to this Court - not the decision in Winchester & Western II.

Winchester & Western I was remanded to the Commission solely to afford the Railroad an opportunity to "rebut the presumption that all its rolling stock is habitually used in Virginia by showing that the average amount habitually used, including cars of other railroads, is less than the 323 cars comprising its entire fleet. Upon such a showing, the Railway may be assessed only on the lesser amount." 226 Va. at 360, 309 S.E.2d at 595, Winchester & Western II, slip op. at 2-3. (App. at I-22 to -23, II-4 to -6.)

The remand for further proceedings on the question of state law, rebutting the presumption of habitual use, did not bar an appeal of Winchester & Western I. This Court has held that where further proceedings in the state courts are

directed, but where the federal issue is conclusive or will survive regardless of the outcome, the case is appropriate for appeal. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-84 (1975). The case at bar fits into the third category described in Cox as follows:

> In the third category are those where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.

Id. at 481.

Like the third category described in Cox, the result of this case on remand was not foreordained. The Railroad

might have presented evidence pertaining to its operations and car usage which would be found by the Commission to be sufficient to rebut the presumption of taxability of all cars, and any federal question would have been moot. In fact, the Commission found on remand that the Railroad did not carry its burden of persuasion, and the original valuation was upheld. The appeal of this second decision to the Virginia Supreme Court was limited to a review of the Commission's finding that the presumption was not rebutted. As described in Cox, the Railroad could not again raise the federal question of foreign tax situs.

The case also meets some of the conditions identified in the fourth category described in Cox as follows:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-83.

To the extent that a federal question was raised in the Virginia proceedings, it was addressed and disposed of by the Virginia Supreme Court in Winchester &

Western I. If this Court had determined on the appeal of that first appellate decision that a federal question had been wrongly decided by the Virginia Supreme Court, further litigation would have been precluded or, at the very least, materially affected.

Under the Cox holdings then, the final decision of the Virginia Supreme Court in Winchester & Western I disposed of all federal questions raised by Railroad and was appropriate for appeal notwithstanding the additional Virginia proceedings. The Railroad, however, did not exercise its right of appeal at that point, but waited until Winchester & Western II was decided.

THE DECISION ON APPEAL IS ADEQUATELY SUPPORTED BY STATE LAW

If a federal question was raised in Winchester & Western II, the Virginia

Supreme Court did not reach it in the decision now on appeal. The memorandum opinion supports no argument that the Virginia Supreme Court did more than affirm the Commission's decision on an issue of fact. There was an adequate basis in state law for the Virginia Supreme Court to affirm the Commission.

This Court has deferred to the interpretations of state tax law by the state's highest court. United Air Lines v. Mahin, 410 U.S. 623, 629 (1973). Further, this Court has long held that its powers on appeal of a state court decision do not extend beyond federal questions, and that review was not appropriate when an adequate state ground for a decision appears on the record. Herb v. Pitcairn, 324 U.S. 117, 125-26, 128 (1945).

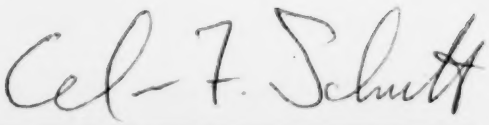
CONCLUSION

The decision on appeal, Winchester & Western II, concerned only the factual question of rebutting a presumption of taxability by production of sufficient evidence. In affirming the Commission by memorandum opinion, the Virginia Supreme Court found that the Commission properly applied Virginia law. The record does not show that the appellate court reached any federal question in affirming the Commission.

To the extent that a federal question was raised by the Railroad before the Virginia Supreme Court, it was disposed of in Winchester & Western I, not the case on appeal. Consequently, the Railroad's jurisdictional statement fails to satisfy the requirements of Rule 16.1, and Appellees Commonwealth of

Virginia and Virginia State Corporation Commission move that this appeal be dismissed.

Dated: December 31, 1986



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AFFIDAVIT OF SERVICE BY MAIL

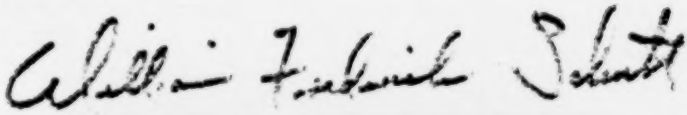
I, William Frederick Schutt, one of the attorneys for the Virginia State Corporation Commission, Appellee in this case, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of December, 1986, I deposited in a United States Post Office located at 10th and Main Streets, Richmond, Virginia, with first-class postage prepaid and proper address, to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Motion to Dismiss.

I further certify that on the 31st day of December, 1986, I deposited in a United States Post Office located at 10th and Main Streets, Richmond, Virginia with first-class postage prepaid and

properly addressed copies of the foregoing Motion to Dismiss to Flournoy L. Largent, Jr., Esquire, P.O. Box 808, Winchester, Virginia 22601, counsel for Appellant, Winchester and Western Railroad Company.

I further certify that on the 31st day of December, 1986, I delivered three (3) copies of the foregoing Motion to Dismiss to the Honorable Mary Sue Terry, Attorney General of Virginia, 101 North 8th Street, Richmond, Virginia 23219.

All parties required to be served have been served.



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APPENDIX

I

Winchester & W. R.R. v. Virginia,

226 Va. 352, 309 S.E.2d 590 (1983)

"Winchester & Western I"

WINCHESTER AND WESTERN RAILROAD COMPANY

v.

COMMONWEALTH OF VIRGINIA, et al.

Record No. 830492.

Supreme Court of Virginia

Dec. 2, 1983.

Before CARRICO, C.J., AND COCHRAN, POFF, COMPTON, STEPHENSON, RUSSELL and THOMAS, JJ.

COCHRAN, Justice.

Pursuant to Code Sec. 58-672, Winchester and Western Railroad Company (the Railway) filed its application with the State Corporation Commission for review and correction of an assessment for taxation of rolling stock as of December 31, 1980. After the Commission denied the application

except for a minor adjustment in the assessment, the Railway filed its petition for appeal against the Commonwealth and the Commission.

Findings of fact, made by the Hearing Examiner and approved by the Commission, are not in dispute. The Railway, a Virginia corporation, operates a railroad located entirely within the boundaries of the Commonwealth; its track extends a distance of 18 miles from Gore to Winchester. The Railway is a wholly-owned subsidiary of Unimin Corporation, which ships sand from its Virginia plant at Gore and from its plants in other states. Prior to 1980, the Railway acquired by long-term lease its entire fleet of 325 freight cars, all of which bore the Railway's

markings during 1980. Of the 325 cars, 209 were never used in Virginia in 1980, 42 were used for not more than two months, 14 for two to six months, and 60 for more than six months. Two of the cars used in Virginia for less than six months were destroyed before December 31, 1980. None of the 325 cars was subject to taxation for 1980 in any state other than Virginia; the Commission assessed all the cars for taxation in Virginia for that year. The Commission did not assess other cars the Railway used in Virginia which did not bear the Railway's markings.

The Hearing Examiner concluded that assessment of 323 cars owned or operated by the Railway on December 31, 1980, was proper. After hearing argument on the Railway's exceptions to

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the Hearing Examiner's report, the Commission, by opinion and order entered January 21, 1983, one member dissenting, approved the assessment of 323 cars. The Commission reduced the total assessment, however, from $9,876,122 to $9,818,128, by deleting the assessed value of the two destroyed cars.

The assessment of rolling stock, mandated by Code Sec. 58-529 (Repl.Vol.1974), is based upon the annual report required by Code Sec. 58-524 (Repl.Vol.1974), which provides in pertinent part as follows:

> Every railway company doing business in this State shall report on or before the fifteenth day of April, to the State Corporation Commission, its real and tangible personal property of every description as of the thirty-first day of December preceding, the fair cash value thereof, and the

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> county, city, town or magisterial district in which it is located ....
>
> The report shall classify such property under the following heads:
>
> * * * * * *
>
> (5) Rolling stock, which shall include all locomotives, of whatever motive power, autocars, cars of every kind and description, and all other equipment which it is reasonably proper to class as rolling stock; provided, that they shall report and be assessed on the average amount of rolling stock habitually used by them in this State;
>
> * * * * * *

The Railway argues, as it did before the Commission, that this statutory language is clear and controlling and that it limits the assessment of rolling stock to the 60 cars used for six months or more in Virginia in 1980. These were the only

cars, the Railway says, that were "habitually used" in Virginia within the meaning of the statute.

The Commission relies upon its long-standing methodology for determining the rolling stock assessable for taxation in Virginia. By Administrative Order entered May 25, 1928, the Commission established the method for determining such assessable rolling stock. As to freight cars, the order provided in pertinent part as follows:

> (a) All freight train cars (except caboose cars) shall be apportioned, apportioning to the State of Virginia that proportion which the car miles made by such equipment in Virginia is of the car miles made by such equipment on the entire system.

Using that methodology, the Commission's opinion stated that the Railway, operating only in Virginia, could only report intrastate car miles; therefore, the percentage to be applied to the rolling stock was 100%.

The Railway contends that the 1972 amendment to Code Sec. 58-524 (Acts 1972, c. 813) changed the applicable law; for the first time, the law put intrastate railroads on the same basis as interstate railroads, which could be taxed only on rolling stock "habitually used" in Virginia. The Commission concedes that the amendment requires that the "habitually used" provision be applied to all railroads subject to the tax, but it asserts that the amendment was not intended to change the law pertaining to taxation of rolling

stock. Since the 1972 amendment became effective, the Commission says, the same methodology used since 1928 has been followed consistently without interruption and without objection by any railroad until the Railway initiated this proceeding. The Commission argues that it has properly determined the Railway's rolling stock "habitually used" in Virginia by using the apportionment formula based on car miles.

The Commission frames the first question on appeal to be whether Virginia can tax all the rolling stock of a railroad which is domiciled and operated solely in Virginia even though some of the railroad's rolling stock never enters the State, or does so only sporadically. This question must be

answered in the affirmative, the Commission says, except for rolling stock for which the railroad has established another tax situs. The Railway, while conceding that Virginia properly imposed such a tax for many years, views the crucial issue to be whether Code Sec. 58-524, as amended in 1972, authorizes Virginia to tax all the Railway's rolling stock, wherever used. We agree that resolution of this appeal turns not upon what Virginia has the right to tax but upon what it has elected to tax under the statute. To determine the legislative intent we will review briefly the history of the taxation of rolling stock in Virginia.

An early statute required every "railroad and canal company not exempted from taxation by virtue of its

charter" to report annually its real and personal property, including rolling stock. Acts 1881-82, c. 119. In Marye v. Baltimore and Ohio Railway, 127 U.S. 117, 8 S.Ct. 1037, 32 L.Ed. 94 (1888), the United States Supreme Court reviewed this statute. The Baltimore and Ohio Railway (B. & O.) was incorporated in Maryland; under its charter its rolling stock was exempt from taxation. The B. & O. had no track in Virginia, but it connected with certain railroads incorporated in Virginia and operated these roads under leases or contracts, using its own rolling stock for the purpose. No rolling stock was permanently set apart for use on these lines. Virginia assessed a tax on the rolling stock of the B. & O. used on these Virginia

railroads and attempted to collect by distraint. A Federal court in Virginia enjoined the collection, and an appeal to the Supreme Court followed. Virginia argues that the tax was assessed only on rolling stock in "constant use" in Virginia. The B. & O. argued that without legislation to the contrary, the tax situs of its personal property was in Maryland, the B. & O.'s place of domicile.

In upholding the injunction, the Supreme Court ruled that the statute applied only to domestic corporations in Virginia. In dicta, however, the Court's opinion stated that if Virginia permitted the B. & O. to bring rolling stock into Virginia "habitually to use" it therein, Virginia could by statute tax such rolling stock even if the

individual items were constantly changing. In such cases, the opinion volunteered, "the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used ...." Id. at 123-24, 8 S.Ct. at 1040.

It appears this suggestion prompted the General Assembly to enact a statute requiring "[e]very railroad and canal company of this state not exempted from taxation by virtue of its charter" and every such company incorporated under the laws of another State and doing business in Virginia to report and pay taxes on its real and personal property. Acts 1891-92, c. 254, p. 429. Included under paragraph "Fourth" to be reported was rolling stock, "provided, that the rolling stock of

foreign corporations doing business in this state shall be assessed on the average amount of such property habitually used in this state." Id.

Until 1972, this proviso, without substantial change in language, remained in the statute providing for assessment of rolling stock. See Acts 1906, c. 300; Acts 1910, c. 281; Acts 1912, c. 214; Acts 1915, c. 141; Code of 1919 Tax Bill Sec. 27; Acts 1926, c. 358; Acts 1927, c. 111; Acts 1928, c. 45, p. 142; Tax Code Sec. 215 (1936); and Code of 1950 Sec. 58-524(5).

From 1915 to 1936, another statute required the Commission to assess annually the rolling stock of all corporations operating railroads and doing business in Virginia "so far as the same is taxable in this State."

Acts 1915, c. 80, p. 112; Code of 1919 Sec. 2207; Acts 1926, c. 576, pp. 956-57. The statute was repealed by Tax Code Sec. 436 (1936); subsequently, the Commission's duties in the assessment of rolling stock were included in Sec. 215 of the 1936 Tax Code, then in Secs. 58-524 et seq. of the 1950 Code. The language "so far as the same is taxable in this State" was eliminated.

The 1972 amendment to Sec. 58-524 (Acts 1972, c. 813) requires "[e]very railway company doing business in this State" to report its real and tangible personal property. References to canal corporations, to corporations of Virginia not exempt from taxation by their charters, and to foreign corporations doing business in Virginia

were deleted. The amendment to the proviso in Sec. 58-524(5) applying to rolling stock deleted the words "foreign railway and canal corporations doing business in this State" and replaced them with the word "they," which apparently refers to every railway company doing business in Virginia. The proviso now reads "provided, that they shall report and be assessed on the average amount of rolling stock habitually used by them in this State."

It is clear, as the Commission concedes, that the amended proviso applies to railroads operating exclusively within Virginia as well as to those operating both within and without the State. Thus, all railroads operating in whole or in part in

Virginia are assessable for taxation on rolling stock "habitually used" in Virginia.

The Commission says that there has been no change in its methodology for assessing rolling stock since 1928 and that the 1972 amendment did not make any substantive change in the law. Under Sec. 163 of the 1902 Constitution, the Commission notes, foreign corporations were prohibited from performing public service business in Virginia except for those foreign corporations engaged in such business on the effective date of the Constitution. Under Article IX, Sec. 5 of the 1971 Constitution, the prohibition was restated without a "grandfather" exception. Therefore, the Commission says, deletion by the

1972 amendment to Code Sec. 58-524(5) of the references to foreign corporations doing railroad or canal business in Virginia merely eliminated obsolete surplusage because there were at that time no such corporations.

Before the 1972 amendment, Code Sec. 58-524 and predecessor statutes provided for taxation of all the rolling stock of Virginia railroads, while providing for taxation of only the rolling stock "habitually used" in Virginia by foreign railroad companies. There was no express statutory authority, therefore, to assess only the rolling stock "habitually used" in Virginia by Virginia railroad companies engaged in multistate operations. Nevertheless, as the Commission says, there have

always been constitutional restrictions on the taxation of multistate operations. The 1928 administrative order recognized these limitations by providing an apportionment process for determining the Virginia assessment of rolling stock of all railroad companies, domestic as well as foreign, which operate both in Virginia and elsewhere. Whether necessary or not, since 1928 the Commission has also used the same methodology for determining the assessment of the rolling stock of intrastate railroads. Thus, since 1928 the Commission has been assessing all railroad rolling stock "habitually used" in Virginia as determined by the percentage of car miles (or in certain instances track miles) in Virginia to total car miles throughout the

railroad's system. In the present case, this results in assessment of all the Railway's rolling stock.

Tax statutes are to be construed strictly against the taxing authority. Com. Nat. Resources v. Commonwealth, 219 Va. 529, 537, 248 S.E.2d. 791, 796 (1978). The construction of a tax statute by the taxing authority, however, is entitled to great weight. Webster v. Department of Taxation, 219 Va. 81, 84-85, 245 S.E.2d 252, 255 (1978). This is especially true where, as in the present case, there has been widespread acquiescence in the construction.

There is a basic presumption, the Commission argues, that an intrastate railroad has only enough cars to render its public service in Virginia and that

it is habitually using all its own cars for that purpose. We agree that this is a reasonable presumption. We also agree that the Commission may reasonably presume that to the extent an intrastate railroad does not use its own cars in Virginia, it uses cars of other railroads which are in effect substitutes for its own. The presumptions, however, are rebuttable. Perhaps, as the Commission maintains, there was no legislative intent to change the substantive law by the 1972 amendment to the statute. Nevertheless, in its present form, the statute, regardless of intent, unequivocally mandates assessment on the average amount of rolling stock habitually used in Virginia, and the statute is controlling. However

reasonable may be the Commission's presumptions, they may be rebutted when the assessment is challenged.

As the Commission concedes, an intrastate railroad may rebut the presumption that all its cars are habitually used in Virginia by showing that some have established a tax base elsewhere. This rebuttable evidence is not available in the present case because none of the Railway's cars is subject to taxation outside Virginia. We conclude that an intrastate railroad may also rebut the presumption by showing that the average amount of rolling stock habitually used by it in Virginia, including cars of other railroads, is less than the total amount of its rolling stock.

We reject the Railway's contention that only its rolling stock used in Virginia for at least six months during the tax year was "habitually used" within the meaning of the statute. The word "habitually" has been defined as "customarily." Black's Law Dictionary, 640 (rev. 5th ed. 1979). Freight cars might be customarily used in Virginia for only a brief period of time within the tax year, far less than six or even two months. The Commission is uniquely qualified to make this determination in evaluating the relevant evidence.

We hold that the Railway may rebut the presumption that all its rolling stock is habitually used in Virginia by showing that the average amount habitually used, including cars of other railroads, is less than the 323

cars comprising its entire fleet. Upon such a showing, the Railway may be assessed only on the lesser amount.

We will reverse the order of the Commission and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

II

Winchester & W. R.R. v. Commonwealth,

No. 860005 (Va. Sup. Ct. Sept. 5, 1986)

(mem.)

"Winchester & Western II"

SUPREME COURT OF VIRGINIA

Present: All the Justices

WINCHESTER AND WESTERN
RAILROAD COMPANY

v. Record No. 860055

COMMONWEALTH OF VIRGINIA AND
STATE CORPORATION COMMISSION

MEMORANDUM
OPINION*
9-5-86

FROM THE STATE CORPORATION
COMMISSION OF VIRGINIA

This case is before the Court for a second time on Winchester and Western Railroad Company's (the Railway) appeal of right from an adverse ruling by the State Corporation Commission concerning the December 31, 1980 assessment of the

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*This opinion is not for publication and is not to be cited or relied upon as precedent in the future.

Railway's rolling stock. We first considered this dispute in W. & W. Ry. Co. v. Commonwealth, 226 Va. 352, 309 S.E.2d 590 (1983).

The facts are the same. The Railway is a Virginia corporation. All of its 18 miles of track lie in Virginia between Gore and Winchester. In 1980, the Railway owned or leased 325 rail cars, none of which was subject to taxation in any state other than Virginia, 42 were used for not more than two months, 14 were used from two to six months, and 60 were used for more than six months. Further, two cars were destroyed prior to December 31, 1980. The Commission assessed 323 cars at $9,818,128.

In the first appeal, the Railway contended that the Commission assessed

more cars than it should have. According to the Railway, it could be taxed only on rail cars habitually used in Virginia and only the 60 rail cars used for more than six months so qualified. The Commission arrived at the number of rail cars to be assessed by applying a presumption to the effect than "an intrastate railroad has only enough cars to render its public service in Virginia and that it is habitually using all its own cars for that purpose." 226 Va. at 359, 309 S.E.2d at 595.

In the first appeal, we rejected the Railway's approach to determining which cars were habitually used in the Commonwealth. Further, we upheld the presumption relied upon by the Commission. However, we said that

presumption was rebuttable.

We stated that the presumption could be rebutted in only two ways: first, by showing that the rail cars had established a tax base elsewhere; second, "by showing that the average amount of rolling stock habitually used by [the Railway] in Virginia, including cars of other railroads, [was] less than the total amount of its rolling stock." Id. at 360, 309 S.E.2d at 595. With regard to the first method of rebutting the presumption, we said it could not be relied on in the instant case because it was plain from the record that none of the Railway's cars was subject to taxation outside Virginia. Consequently, we remanded the case for the sole purpose of permitting the Railway to attempt to

rebut the presumption by using the second alternative set forth above.

On remand, the Railway sought to rebut the presumption relied upon by the Commission by advancing two calculations which purportedly showed that the number of cars habitually used in Virginia was less than 323. The Commission rejected the calculations advanced by the railroad on the grounds that they were either the product of faulty reasoning or that they did not consider all the facts. It would serve no useful purpose to restate here the analysis made by the Commission. Suffice it to say that upon our review of the record, we conclude that the Commission correctly ruled that the Railway failed to rebut the presumption. Therefore, we will affirm

the Commission's decision.

Affirmed.